No. 12-60796

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ENTERGY MISSISSIPPI, INC.,

Petitioner/Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent/Cross-Petitioner

ON PETITION FOR REVIEW AND CROSS APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR INTERVENOR, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, LOCAL UNIONS 605 AND 685, IN SUPPORT OF THE NATIONAL LABOR RELATIONS BOARD

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STATEMENT REGARDING ORAL ARGUMENT

Intervenor, International Brotherhood of Electrical Workers, AFL-CIO, Local Unions 605 and 984, agrees with the National Labor Relations Board that oral argument is appropriate in this case, and hereby adopts the Board's explanation of why oral argument is appropriate.

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JURISDICTIONAL STATEMENT

Intervenor, International Brotherhood of Electrical Workers, AFL-CIO, Local Unions 605 and 985 ("intervenor" or "IBEW") hereby adopts the Jurisdictional Statement set forth in the Brief of Respondent/Cross Petitioner National Labor Relations Board ("Board) with respect to the petition of Entergy Mississippi, Inc. ("EMI") for review of the Board's Decision and Order in *Entergy Mississippi, Inc.*, 361 NLRB No. 89 (Oct. 14, 2014). (D&O II)[1] *See* Board's Brief (BB) at 1-3.

STATEMENT OF THE ISSUE PRESENTED

1. Whether the Board reasonably found that EMI violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. §§159(a)(5) and (1) ("the Act"),

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[1] Reference to "DOR" is to the Board's December 30, 2011 Decision on Review, located at pp. 1925-36 of the administrative record, and cited in the Board's reported volumes at 357 NLRB No. 178. "D&O I" refers to the Board's August 14, 2014 Decision and Order, located in the record at pp. 1996-2000 and cited as 358 NLRB No. 99 in the Board's volumes. "D&O II" refers to the Board's October 31, 2014 (post-*Noel* Canning) Decision and Order, located in the record at 2002-07, and reported at 361 NLRB No. 89. (All are in Volume VII of the Administrative Record.) "RD" refers to the Acting Regional Director's Decision and Order in 2004; "Supp. RD refers to the Acting Regional Director's Supplemental Decision and Order. (Both are in Vol. VI of the record, at pages 565-595 and 1115-1149, respectively.)

The Intervenor will refer to the transcripts of the 2003 and 2006 hearings as "03TR___" and "06TR___", respectively; and to the exhibits of record at each hearing as "PE__-2003" or "PE__-2006" (petitioner), "UE__-2003" or "UE__-2006" (union). The 2003 documents are in Vol. III of the record; the 2006 documents are in Vol. V of the record. Intervenor will also refer to the Board's Brief as "BB__," the Petitioner's Brief to this Court as "PB __."

when it unilaterally removed transmission and distribution electric utility dispatchers ("dispatchers") from the bargaining unit and refused to bargain with the intervenor unions as their representatives. The resolution of this question implicates the Board's decision, in *Entergy Mississippi, Inc.*, 357 NLRB No. 178 (2011) (DOR), that EMI's dispatchers were not supervisors at the time EMI unilaterally removed them from the bargaining unit, on November 1, 2006.

STATEMENT OF THE CASE

Intervenor hereby adopts the statement of the case set forth by the Board in its Brief at 3-5.

STATEMENT OF FACTS

Intervenor adopts the statement of the Board's finding of facts as set forth by the Board in its Brief at 5-12, and will add only the following additional facts relevant to EMI' structure and the structural relationship of the dispatchers to the field employees they allegedly supervise, on which the Board did not rely in its decision, but which the Court may find helpful in rendering its decision. These facts establish that the dispatchers and the field personnel they allegedly supervise are in entirely separate chains of command.

A. Distribution Dispatchers and Distribution Field Employees

The distribution dispatchers and the field personnel (*i.e.*, line crews and servicemen) are part of EMI under President and CEO Carolyn Shanks. (PE1-

2006at2) Directly under Shanks is Director of Distribution Operations Dennis Dawsey. (*Id.* at 3) Below Dawsey's level, it is apparent that the dispatchers and field personnel are in entirely separate chains of command.

Dispatchers: Directly under Dawsey is Manager of Distribution Resources Allen T. East. (PE1-2006at4) Directly under East is Manager of Distribution Dispatch John Scott. (*Id.* at 5) The distribution dispatchers are directly under Scott. (*Id.* at 6) There is no one under the dispatchers on the EMI organization chart. (*Id.*) These dispatchers work out of the Distribution Operations Center ("DOC"). (03TR944)

Field Personnel: As stated, the line crews and servicemen (field personnel) are in a completely different management structure from the distribution dispatchers. Thus, on the 2003 organization chart, directly under the Director of Distribution Operations, and on the same level as Allen East, there are: a Manager of Construction and Design (Frank Buchanan in 2003) (PEl-2003 at d); a Distribution Substation Manager-MS (Jose Soleibe) (*id.*); and various Network Managers (*id.*). The field personnel all work under Managers in one of these groups. (03TR28-29,32,38,884) In each Network, there is also an Operations Coordinator, who primarily directs the operations of the field personnel, aids in prioritizing their routines and makes sure the right numbers of people are placed on the job site. (03TR162,164) The employer considers this person to be supervisory.

(03TR163-165) None of the disputed dispatcher classifications is part of these field organizations. (03TR169)

B. Transmission Dispatchers and Transmission Field Employees

EMI's transmission operations appear to be part of an altogether different organization from its distribution operations. Executive Vice President of Operations Mark T. Savoff and Vice President of Transmission Randall W. Helmick head the company's transmission operations (PE2d-2003;PE49-2006at1-3), and directly under Helmick is George Bartlett, Director of Transmission Operations. (PE49-2006at3) Nevertheless, as in distribution, it is readily apparent that the dispatchers and field employees in transmission are in entirely separate chains of command.

Dispatchers: Directly under Bartlett is Thomas (Duane) Sistrunk, the Manager of the Transmission Operations Center ("TOC") for Mississippi. (PE49-2006at4) The transmission dispatchers are all under Sistrunk, and have no one on the organization charts under them. (PE49-2006at5)

Field Personnel: The supervisors of the transmission substation (field) personnel are the Substation Maintenance Supervisors ("SMSs"), North and South. (03TR368) The SMSs assign the mechanics work, and the transmission substation personnel have a weekly work schedule that routes them to their work. The schedule is computer generated, with input from field supervision. (03TR368-69)

Operations Coordinators in transmission maintenance are the day-to-day supervisors for the transmission line mechanics and relay men. (03TR418)

SUMMARY OF ARGUMENT

EMI argues that its transmission and distribution dispatchers are supervisors, and were when it unilaterally removed them from the bargaining unit in 2006. In support, EMI chiefly relies on this Court's decision in *Entergy Gulf States v. NLRB*, 253 F.3d 203 (5th Cir. 2001). EMI ignores the fact, however, that the decisions of which this Court disapproved in *Entergy Gulf States* have been superseded by the Board's clarified and revised standards in the *Oakwood Healthcare* Trilogy, and that these revisions address the Court's concerns in *Entergy Gulf States*. Accordingly, EMI fails to apply the correct legal standards here.

Under those standards, as approved and applied by the federal appellate courts, EMI's dispatchers are not supervisors. EMI claims supervisory status for the dispatchers because they allegedly assign and responsibly direct field employees using independent judgment. However, the Board's decisions to the contrary are supported by substantial evidence in the record as a whole. The dispatchers do not responsibly direct field employees, for the simple reason that they do not do so "responsibly, as the Board clarified that term in the *Oakwood Trilogy*: that is, the dispatchers are not accountable for any errors made by the field

employees. And the dispatchers do not engage in supervisory assignment of field employees because they do not give the employees "significant overall duties," but, instead, give them "tasks." To the extent the dispatchers assign field employees to a place or time, they do not do so using independent judgment and they cannot *require* the field employees to accept overtime.

ARGUMENT

I. THE BOARD'S DECISION THAT EMI'S DISPATCHERS ARE NOT SUPERVISORS IS IN ACCORDANCE WITH WELL-ACCEPTED LEGAL PRINCIPLES AND SUPPORTED BY SUBSTANTIAL EVIDENCE

A. Standard of Review

Petitioner adopts the description of the standard of review set forth in the Board's Brief at 17-20, and wishes only to expand on a single point: EMI's insistence that this Court's decision in *Entergy Gulf States,* 253 F.3d 203 (5th Cir. 2001) is the controlling authority in this case, and that, consequently, the Board's underlying decision deserves "little judicial deference," if any at all. (PB13, 16-25)

1. The Court's Decision in *Entergy Gulf States* Does Not Control the Outcome in this Case

In *Entergy Gulf States* this Court refused to afford deference to the Board's decision in *Mississippi Power & Light Co.,* 328 NLRB 965 (1999), the case on which the Board's analysis in the underlying decision in *Entergy Gulf States* was based. *See Entergy Gulf States,* 253 F.3d at 208. In *Entergy Gulf States,* this Court found that the Board had departed in *Mississippi Power,* without reasoned explanation, from the position it had espoused for many years regarding the supervisory status of electric system dispatchers. *Entergy Gulf States,* 253 F.3d at 208. This Court expressly chastised the Board for adopting an analysis that

"distinguished traditional supervisors from skilled employees who merely use *professional judgment* to direct others," as the Board had done in medical "charge nurse" cases. *Id.* at 210, 211. (emphasis added)

EMI's claim that *Entergy Gulf States*, is the "controlling authority" is, however, erroneous. EMI simply ignores the fact that the Board has substantially refined and clarified the aspects of supervisory jurisprudence that troubled this Court in *Entergy Gulf States*. Significantly, the Board did not rely in the instant case on *Mississippi Power & Light*, but relied instead on the clarified standards for assessing supervisory status it explained in three cases collectively referred to as "the *Oakwood* trilogy." Those cases are: *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006); *Croft Metals, Inc.*, 348 NLRB 717 (2006); and *Golden Crest Healthcare Center*, 348 NLRB 727 (2006). Moreover, the standards announced in the *Oakwood* trilogy are not, as EMI asserts, "the same legal standards" applied by this Court in *Entergy Gulf States*.[2]

[2] In *Entergy Gulf States*, the only issues in dispute were whether the dispatchers ("OCs") used independent judgment to responsibly direct, reward, or discipline others. 253 F.3d at 209. Thus, this Court did not address the supervisory function of assignment, or the exercise of independent judgment in connection with such assignment. Also, as explained below, the Board expanded and revised the definitions of the accountability necessary for responsible direction, as well as independent judgement in the *Oakwood* trilogy, and thus created revisions to those concepts that this Court did not have the opportunity to consider in *Entergy Gulf States.*

As set forth in more detail below at Section I.B.1, the Board reviewed and revised the supervisory duties of "assign" and "responsibly to direct," and the meaning of "independent judgment" in connection with these two functions, in response to the Supreme Court's criticisms and guidance in *NLRB* v. *Kentucky River Community Care*, 532 U.S. 706 (2001). As also explained in more detail below at Section I.B.1, the Board undertook this review in response to the Supreme Court's criticisms of its efforts to carve out an exception from supervisory status for employees whose authority with respect to responsibly directing other employees is based on technical or professional judgment -- the same fundamental issue that this Court addressed in *Entergy Gulf States*, and which had troubled the federal courts of appeals in reviewing the Board's decisions on charge nurses as well as electric dispatchers.

As a result of its review, the Board revised and clarified its interpretations of the supervisory functions of assignment and responsible direction, as well as its explanation of the concept of independent judgment, and its application to these two functions. And, the Board in the instant case expressly disavowed the aspect of *Mississippi Power & Light* that troubled this Court in *Entergy Gulf States*:

> Therefore, contrary to the Board's holding in *Mississippi Power* that the dispatchers exercise of critical judgment based on their experience or expertise does not constitute the exercise of independent judgment, the Board has since clarified its interpretation of supervisory independent judgment to include those judgments exercised as a result of one's professional

> expertise, as long as it is exercised in relation to 1 of the 12 indicia of supervisory authority.

Entergy Mississippi, 359 NLRB No. 178, slip op. at 5. (DOR 1925)

The Supreme Court has observed that these supervisory concepts of "assign" and "responsibly to direct" are ambiguous. *See NLRB v. Healthcare & Retirement Corp.*, 511 U.S. 571, 579 (1994); and *Kentucky River*, 532 U.S. at 714. Consequently, the federal appellate courts must uphold the Board's interpretations of these revised standards if they are reasonable. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 845 (1984). And the federal appellate courts have found the *Oakwood* standards to be reasonable. *See, e.g., Lakeland Healthcare Associates, LLC v. NLRB*, 696 F.3d 1332, 1344 (11th Cir. 2012); *Frenchtown Acquisition Co., Inc. v. NLRB*, 683 F.3d 298, 313 (6th Cir. 2012); *Mars Home for Youth v. NLRB*, 666 F.3d 850, 854 n. 2 (3d Cir. 2011); and *Loparex LLC v. NLRB*, 591 F.3d 550, 550 (7th Cir. 2009).

Thus, this Court must uphold the Board's interpretations of the relevant terms in the *Oakwood* trilogy, if it too finds they are reasonable. It is important to that analysis that no federal appellate court has rejected the revised standards, and that a number of appellate courts have found the Board's expansions on the definitions of "assign," "responsibly to direct" and "independent judgment" to be reasonable. *See* discussion, below, at Section I.B.2, and cases cited therein. Indeed, the Court of Appeals for the D.C. Circuit stated, when enforcing a Board

decision finding dispatchers (similar to those at issue in this case) not to be supervisors under *Oakwood Healthcare*, that the Board's decision in *Oakwood* is the "controlling law" and "undisputedly reflects sound law." *Avista Corp. v. NLRB*, 2013 U.S. App. Lexis 1377 (unpublished) (per curiam) (D.C. Cir. Jan. 18, 2013).

B. The Board's Revised Standards for Assessing Supervisory Status

1. The Impetus for the Board's Review of its Supervisory Standards

For a number of years, the Board struggled with the application of the supervisory functions of "assign" and "responsibly to direct," and the interpretation of "independent judgment" as it applied to certain employees who exercise technical or professional judgment in their day-to-day work, or whose instruction of others comes from superior education or experience. The Board had particular difficulty with these issues with regard to nurses and charge nurses. Indeed, in searching for ways to distinguish employees whose experience and education could play a part in their "assignment" and "responsible direction" of other employees from supervisors, the Board had two noteworthy false starts.

a. Nurse Cases

The United States Supreme Court rejected the Board's first approach to distinguish nurses from supervisors, in *NLRB v. Health Care & Retirement Corp. of America*, 511 U.S. 571 (1994). In *Health Care*, the Board had argued that

nurses did not exercise their authority "in the interest of the employer" when their "independent judgment" was exercised incidental to "technical or professional judgment," rather than for disciplinary or other matters. The Court rejected the Board's theory as "inconsistent with … the statutory language because it "rea[d] the responsible direction portion of §2(11) out of the statute in nurse cases." *Id.* at 579-80.

The Supreme Court rejected the Board's next attempt as well, in *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001). Having lost on its attempt to define "in the interest of the employer" differently for technical and professional employees, the Board then attempted to render these employees non-supervisory by carving out an exception when interpreting the requirement that a supervisor must use "independent judgment" in carrying out any of the 12 supervisory functions. As the Supreme Court explained, the Board was asserting that "employees do not use independent judgment when they exercise ordinary professional or technical judgment in directing less-skilled employees to deliver services in accordance with employer specified guidelines." *Id.* at 713.

Again the Court refused to permit the Board to carve out one *type* of judgment from the meaning of supervisory "independent judgment." Instead, the Court stated that, because the statutory term independent judgment is "ambiguous with respect to the *degree* of judgment required for supervisory status, the Board

could limit supervisory independent judgment by the *degree* of judgment exercised. *Id. at 713.* The Court was emphatic however, that the Board cannot classify employees who exercise a *high* degree of judgment as non-supervisory simply because the judgment is technical or professional in nature, or otherwise based on superior education or experience. *Id.* at 714. The Court further explained that the Board was doing again what it had done in *Health Care:* that is, it was attempting to carve out an entire category of judgment from the concept of independent judgment.

b. Electric System Dispatcher Cases

Two federal appellate courts faced the same issues in applying *Kentucky River* to the Board's treatment of electric system dispatchers under *Mississippi Power & Light*, 328 NLRB 965 (1999). As this Court noted in *Entergy Gulf States*, 253 F. 3d at 209-10, the problem began when the Court of Appeals for the First Circuit suggested that the Board reexamine its approach in the public utilities sector, in light of the court's decision that certain "quasi-professional, quasi-overseer" pool coordinators were not accountable for the actions of others and were not statutory supervisors, in *See Northeast Utilities Service Corp. v. NLRB*, 35 F.3d 621, 625 (1st Cir. 1994). As this Court explained, the Board then used this invitation to distinguish traditional supervisors from skilled employees who merely use "professional" judgment to direct others. *Entergy Gulf States*, 253 F.3d at 210.

Further, this Court ruled that the Board's attempt to analogize dispatchers to charge nurses in *Mississippi Power & Light*, on the basis of their technical expertise and judgment, had been invalidated by the Supreme Court in *Kentucky River*. *Entergy Gulf States,* 253 F.3d at 211.

The Court of Appeals for the Tenth Circuit also refused to follow the Board's decision in *Mississippi Power & Light*, for similar reasons. In *Public Service of Colorado v. NLRB,* 271 F.3d 1213 (10th Cir. 2001), the court found that transmission dispatchers were supervisors, contrary to the Board. In the court's view, *Mississippi Power* and its reference to charge nurse cases placed it within the umbrella of *Kentucky River*. The court also advised the Board that, if it wished to introduce a new standard for supervisory responsible direction, it should do so "forthrightly and explicitly." *Id.* at 1221.[3]

[3] EMI also cited six other pre-*Oakwood* cases in support of its argument that eight federal courts have addressed this issue and "have concluded that utility industry Dispatchers, *just like those as issue in this case,* are statutory supervisors" (Brief at 24 and n. 28) (emphasis added). Intervenor notes that the employees at issue in these six cases are not, however, just like those at issue in this case due to a number of factual distinctions. Moreover, two of the six cases do not even involve dispatchers, instead, they involve Plant Operations personnel, specifically plant Control Room personnel. *See, e.g., Maine Yankee Atomic Power Co. v. NLRB*, 624 F.2d 347 (1st Cir. 1980) (finding Shift Operations Supervisors to be statutory supervisors), and *Monongahela Power Co.,* 657 F.2d 608 (4th Cir. 1981) (finding Control Room Foremen, also known as Control Room Operators to be statutory supervisors). Even under the standards prior to *Oakwood,* Shift Operations Supervisors, generally engineers, were usually considered to be statutory supervisors when challenged, while the inclusion or exclusion of Control Room Operators has been controlled by the particular factual situations of each

c. The Supreme Court's Guidance

The Court in *Kentucky River* did provide the Board with guidance, however, on how to address the problem of technical and professional judgment. The guidance was in fact quite similar to that given by the Tenth Circuit in *Public Service of Colorado*. The Court advised the Board that, instead of distorting the meaning of "in the interest of the employer" or "independent judgment," the Board could develop a *limiting definition* of one or more *of the supervisory functions themselves,* citing as an example the supervisory function of responsible direction." *Id.* at 952.

2. The Clarified Standards

In response to the Supreme Court's criticism in both cases, and in accordance with the Court's guidance in *Kentucky River,* the Board issued a notice and invitation to the parties and interested amici curiae to files briefs addressing the meaning of the supervisory functions of "assign" and "responsibly to direct," as well as the meaning of "independent judgment." *See Oakwood Healthcare, Inc.*, 348 NLRB 686, 686 (2006). Twenty separate entities filed responsive briefs. *Id.* at 686 n. 3. As set forth below, the Board afforded a reasoned explanation for each change or clarification that it made. Because the federal courts of appeals, as

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case. *See, e.g., PECO Energy Co.,* 322 NLRB 1074, 1083 (1997) (Control Room Operators voted subject to challenge because of insufficient evidence of use of independent judgment in directing Plant Operators).

stated, had disapproved the Board's prior standards in nurse and dispatcher cases, the intervenor will set forth, after each explanation of the Board's rulings in the *Oakwood* trilogy, an explanation of how the federal appellate courts have responded to the new standards.

(a) Supervisory Assignment

(1) The Board's Clarification

The Board first noted that the term "assign" must have a meaning distinct from the term "responsibly to direct," and that "assign" shares with the other Section 2(11) functions the common trait of having an effect on (or affecting) a term or condition of employment. *Oakwood,* 348 NLRB at 689. Consequently, the Board clarified that in the context of Section 2(11) "assign" refers to the act of designating an employee to a place (such as a location, department or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties to an employee. *Id.* at 689-90. The Board distinguished the latter from "ad hoc instructions to perform discrete tasks," which it found to be "direction" rather than assignment. *Id.* at 690.[4]

[4] As stated, this Court did not address supervisory assignment in its decision in *Entergy Gulf States,* which is one of the reasons why that decision is not controlling here.

(2) The Federal Courts' Approval and Application

In assessing whether assistant Managers, Licensed Practical Nurses (LPN), driver dispatchers, and a rehabilitation centers' charge nurses and shift supervisors, engage in supervisory assignment, the four appellate courts that have reviewed Board decisions on this issue have agreed with the Board that they do not.

The two courts that addressed the issue of "significant overall duties" agreed with the Board that, because the purported supervisors made only ad hoc assignments of specific tasks, the assignments were not supervisory. *See Mars Home for Youth v. NLRB*, 666 F.3d 850, 854 n. 2 (3d Cir. 2011) (managers did not assign significant overall tasks to resident assistants (RAs) and were not in charge of their daily schedules, but gave them only ad hoc assignments, such as monitoring a single resident, or responding to a crises); and *Lakeland Healthcare Associates, LLC v. NLRB,* 696 F.3d 1332, 1347 (11th Cir. 2012) (agreeing that licensed professional nurses (LPNs) were not supervisors of certified nursing assistants (CNAs), because the LPNs assigned only tasks, on an ad hoc basis, depending on particular needs as they arose, such as taking vital signs or administering a sedative to a particular patient).

(b) Responsibly to Direct

(1) The Board's Clarifications

In clarifying the phrase "responsibly to direct," the Board focused principally on the term "responsibly," and explained that this supervisory function was never intended to include "minor supervisory functions performed by lead employees, straw bosses, and set-up men." *Oakwood*, 348 NLRB at 690. Thus, one may "direct" another employee, but the directing employee is only a statutory supervisor if he or she is "responsible" for the directed employee's performance *and* the exercise of the authority requires the use of "independent judgment." *Id.* at 691 n. 28.

In defining the term "responsibly," the Board first noted that is agreed with several courts of appeals, including this Court,[5] that, for direction to be "responsible," the person directing and performing the oversight must be *accountable* for the performance of the task by the other, such that some adverse consequence may befall the one performing the oversight if the tasks performed by the supervised employees are not performed properly. *Id.* at 691-692.

[5] The Board in fact quoted directly from this Court's decision in *NLRB v. KDFW-TV, Inc.*, 790 F.3d 1273, 1278 (5th Cir. 1986), in which this Court interpreted accountability to include a situation in which an employee has been reprimanded for the performance of *others* in his department. The Board's interpretation of accountability in *Oakwood* is, however, more detailed than this Court's in *Entergy Gulf States*, so that, as explained below, the two decisions do not apply exactly the same standards.

While the Board, as stated, agreed with this Court's decision in *NLRB v. KDFW-TV, Inc.*, regarding accountability, it went on in *Oakwood* to define more precisely what supervisory "accountability" comprises. Thus, contrary to EMI, the fact that the Court relied on *KDFW-TV* in *Entergy Gulf States,* does not make the *Oakwood* standards the same as the standards applied in *Entergy Gulf States.*

To establish accountability, the Board clarified in *Oakwood* that it must be shown that the employer (1) "delegated to the putative supervisor the authority to direct the work, and the authority to take *corrective action*, if necessary." 348 NLRB at 692. And it must *also* be shown (2) that there is "a prospect of adverse consequences for the putative supervisor if he/she does not take these [corrective] steps." *Id.* at 692. The Board explained that this concept of accountability creates a clear distinction between those employees whose interests, in directing other employees' tasks, align with management from those whose interests in directing other employees is simply the completion of a certain task. In the case of the former, said the Board, the dynamics of a hierarchical authority will arise, under which the directing employee will have "an adversarial relationship with those he is directing." *Id.*

(a) Corrective Action

The reference to the ability to take "corrective action" appears to be a clarification of the Board's and appellate court's interpretations of "accountable."

And, as the Board explained, "corrective action" must involve something more than telling someone how to do his or her job correctly. In *Croft Metals*, for example, the Board explained that "verbal warnings" or "escorting non-compliant employees to the company's personnel office or higher plant supervisors" are examples of corrective action. *Croft Metals*, slip op. at 6.

(b) Adverse Consequences

As stated, supervisory responsibility entails the prospect of "adverse consequences" to the putative supervisors if the tasks performed by the alleged supervisee are not performed properly. In *Croft Metals*, for example, lead persons were deemed supervisors where they were issued written warnings for the *failures of their crews* to meet production goals, or because of other shortcomings *of their crews.* Thus discipline for her or her own mistakes is not sufficient to establish supervisory responsibility.

This Court did not consider or apply these aspects of "responsible" direction in *Entergy Gulf States*, but relied on other factors not within the revised definitions of "responsible" in the *Oakwood* trilogy.

(2) Appellate Court Approval and Application

The post-*Oakwood* analyses by appellate courts appear to focus on the question of whether the putative supervisors are "responsible" for the performance of other employees. And all of the courts that have considered that Board's refined

definition of "responsible" have agreed that the term means "accountable" as the Board has defined that term.

(a) Authority to take "Corrective Action"

As the Court of Appeals for the Seventh Circuit explained, in *Loparex LLC v. NLRB,* 591 F.3d at 550-51, when approving the Board's determination that shift leaders did not have the authority to take corrective action over crew members, and thus were not supervisors, corrective action is something different from disciplinary action. It involves a situation in which the putative supervisor is able to correct the alleged supervisee in some meaningful sense. That is, if a crew member was insubordinate and the shift leader's only option was to submit a factual report detailing the issue to her team manager, this is not supervisory "corrective action." In the court's view, such actions as requiring a co-worker to stay late and finish a project on which the worker has fallen behind, *would* constitute corrective action. The same court also clarified, in *Rochelle Waste Disposal, LLC v. NLRB,* 673 F.3d 587, 595 (7th Cir. 2012), that for an action to be "corrective" the putative supervisor must be able to *require* the alleged supervisee to take the action.

(b) Adverse Consequences

All of the courts have agreed with the Board that the putative supervisor must face at least the prospect of actual adverse consequences for the failures of

the supervised *employees*, rather than for his/her own mistakes. *See, e.g.*, *Lakeland Healthcare*, 696 F.3d at 1345 (a prospect of adverse consequences is sufficient, but there must be more than merely a paper showing that such a prospect exists); *Rochelle Waste Disposal*, 637 F.3d at 596 (the alleged supervisor may simply be *at risk* for adverse consequences, but that risk must be for the bad performance of *others*, not his own performance in overseeing others).

The courts have been fairly specific regarding the proof necessary to establish that the purported supervisor is at risk of adverse consequences for the misconduct of the alleged supervisees. Where for example, an employer testified that an alleged supervisor was given an "oral reprimand" for a lower level employee's bad performance, the court found no supervisory "responsibility" because there was no proof that the alleged supervisor actually suffered an adverse consequences. *Rochelle Waste Disposal*, 673 F.2d at 596. *See also Frenchtown Acquisition Co.*, 683 F.3d at 314-15 (where there was testimony that a bad evaluation for monitoring alleged subordinates performance *could* affect promotions of alleged supervisors and lead to their discipline, the court found that responsibility had not been established because there was no evidence it had even happened, the nurses' job descriptions did not convey that nurses may suffer adverse consequences for aids' performance, and there was an admission that evaluations did not affect nurses' pay); and *Mars Home for Youth*, 666 F.3d at 854

(assistant managers were not "responsible" for the failure of resident assistants to follow the managers' directions, because the record showed that the managers were not disciplined for the assistants' failures, but for their own failings as managers).

On the other hand, where a job description stated that an alleged supervisor's primary purpose is to supervise the day-to-day activities of the supposed supervisees, *and* there was uncontradicted testimony that the LPNs would be written up if they failed to ensure the CNAs complied with company standards, the court did find supervisory accountability. *Lakeland Healthcare,* 696 F. 3d at 1332. However, where a lower level employee performs inadequately, and the purported supervisor is in fact *not* held accountable, the evidence "highly supports a finding that the purported supervisor is in fact not actually at risk of suffering adverse consequences for the performance of others. *Rochelle Waste Disposal*, 673 F. 3d at 596. *See also NLRB v. Atlantic Paratransit,* 300 Fed. Appx. 54, 57 (2d Cir. 2008) (conclusory testimony that adverse consequences were likely for driver dispatchers insufficient to establish supervisory "responsibility" where the employer could not point to any instance in which dispatchers were warned that they could face adverse consequences if the drivers did not perform properly, or that any dispatcher was actually disciplined for any driver misconduct).

c. Independent Judgment

(1) The Board's Clarifications

In response to the Supreme Court's admonitions in *Kentucky River*, the Board revisited its interpretation of supervisory independent judgment. In doing so, the Board was mindful that it could not carve out a special *type* of judgment, *i.e.*, technical and professional, or that based on superior education or experience, and then exempt it from supervisory independent judgment as applied to only one of the eleven supervisory functions – for example, responsible direction. This was what the Supreme Court criticized in *Kentucky River*, and what this Court effectively criticized in *Entergy Gulf States.*

Instead, the Board focused, as the Supreme Court advised it to do, on the *degree of discretion* required to render a judgment supervisory, when applied to *any* supervisory function. *Oakwood*, 348 NLRB at 692. In accord with the formal dictionary definitions of each word, the Board concluded that supervisory independent judgment requires, at a minimum, that an individual must act free of the control of others and form an opinion or evaluation by discerning and comparing data. *Id.* at 692-93. The Board noted in addition, however, that this definition may be constrained by the language of the Act itself, that is, when the judgment exercised is of "merely a routine or clerical nature." *Id.* at 693.

The Board explained that judgment that is dependent upon the control of others is not "independent," whether that control comes from detailed instructions in the form of company policies or rules, verbal instructions from a higher authority, or the provisions of a collective bargaining agreement. *Id.* at 693. Examples of non-supervisory judgment include staffing decisions made in accordance with a fixed nurse-to-patient ratio, or assignments based on seniority, in accordance with the provisions of a collective bargaining agreement. *Id.*

On the other hand, judgment, even if guided by policies, may be independent if it requires the purported supervisor to assess the employees' ability or experience, or other credentials, in making an assignment or recommendation for hire. *Id.* If there is, however, only one obvious and self-evident choice, then the assignment is routine and clerical. *Id.*

Another reason why EMI errs in stating that this Court's decision in *Entergy Gulf States* sets forth the *same standards* as the *Oakwood* Trilogy, is that that this Court did not have the opportunity to consider this definition of "independent judgment" in *Entergy Gulf States*.

(2) Appellate Court Approval and Application

(a) Independent judgment in relation to assignment

In *Mars Home for Youth*, 666 F.3d at 855, the Third Circuit agreed with the Board and found that the assistant managers did not use independent judgment when "assigning" employees to certain schedules, because (1) the managers had no authority to *require* RAs to follow certain schedules; (2) when seeking volunteers in staffing shortage situations, the managers were required to follow the employer's policy and call the most junior PA first; and (3) the managers based transportation staffing decisions on the gender of the patient.

In *NLRB v. Atlantic Paratransit*, 300 Fed. Appx. at 56, the Second Circuit also agreed with the Board and found no independent judgment used in "assigning" drivers to routes because: (1) the large majority of the routes were pre-assigned; (2) when the dispatchers had to reassign drivers they did so based on mechanical factors, such as geographic location and company policies, and *not on the skill of the drivers.* In addition, the court found that there is no independent judgment involved in granting overtime to drivers *as needed to complete assigned tasks*, because such is "a mechanical incident of assigning [employees] in the first place." *Id.* Finally, where there is no evidence that dispatchers, in responding to an accident, rely on their own experience or expertise to assess the situation or determine the appropriate response, but merely determine the most efficient

response based on geography or company policy, their judgment is not independent, supervisory, judgment. *Id.*

And, in *Greenville Skilled Nursing and Rehabilitation Center v. NLRB*, 474 Fed. App'x 782 (D.C. Cir. 2012) (unpublished), the court agreed with the Board that the employer had failed to establish its charge nurses and shift supervisors used independent judgment in assigning employees, where: (1) the charge nurses lacked final authority to deny an employees' request to leave early in a non-emergency situation; and (2) shift supervisors could only seek volunteers to replace absent employees and, in doing so, had to follow detailed criteria set by the employer.

Even considering the Eleventh Circuit's contrary view in *Lakeland Healthcare Associates, LLC v. NLRB,* 696 F.3d at 1348-49, the weight of circuit court authority supports the Board's view on what constitutes supervisory independent jugement in assignment of work.[6] The federal court's application of

[6] Indeed, the court's decision in *Lakeland Healthcare Associates* on this point is puzzling, to say the least. The court admitted that it was ignoring its own precedent on independent judgment in connection with assignment, which required that the supervisor assign work on the basis of the employees' individual skills. 696 F.3d at 1348-49. Instead, the court adopted the admittedly "less rigorous standard" adopted by the Fourth Circuit in a pre-*Oakwood Healthcare* case – *Glenmark v. NLRB,* 147 F.3d 333, 341 (4th Cir. 1998). In that case, the Fourth Circuit had relied on the fact that "for two out of three shifts during the day, and on all three shifts over the weekend, there is no higher authority than the charge nurse." The Eleventh Circuit was persuaded by the Fourth that, putative supervisors cannot be mechanically following established procedure in assigning

independent judgment as applied to assignment is discussed above at Section I.B.a.(2)(b).

(ii) Independent judgment in relation to responsible direction

None of the federal appellate courts have applied the Board's clarified standards for independent judgement to responsible direction, however, as all but one of the courts that addressed this question found that the direction at issue was not responsible, and thus had no occasion to consider whether it was undertaken using independent judgment. *See, e.g., Rochelle Waste Disposal, LLC v. NLRB,* 673 F.3d 587, 596-97 (7th Cir. 2012); *Frenchtown Acquisition Co.,* 683 F.3d 298,314-15 (6th Cir. 2012); *Mars Home for Youth v. NLRB*, 666 F. 3d at 850, 854 (3.d Cir. 2011); *Loparex LLC v. NLRB,* 591 F.3d 550, 550-51 (7th Cir. 2009); *NLRB v. Atlantic Paratransit,* 300 Fed. Appx. 54, 57 (2d. Cir. 2008); and *Greenville Skilled Nursing and Rehabilitation Center v. NLRB,* 474 Fed. App'x 782, 784 (D.C. Cir. 2012) (unpublished).

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and reassigning putative supervisees, when they are the highest ranking staff on the premises. *Lakeland*, 696 F.3d at 1349. Not surprisingly, the decision drew a dissent from one of the circuit judges, who argued that being the highest ranking supervisor on site does not *ipso facto* render supervisory status, particularly where higher ranking employees are on call, and where someone else exercises primary authority to make the schedules. *Id.* at 1354. The District of Columbia Circuit has also agreed, post-*Oakwood,* that the "absence of a statutory supervisor does not automatically confer supervisory status on the highest ranking person." *Greenville Skilled Nursing and Rehabilitation Center v. NLRB,* 474 Fed. App'x 782 (D.C. Cir. 2012) (unpublished) (citing its prior decision in *Jochims v. NLRB,* 480 F.3d 1161 (D.C. Cir. 2007).

C. The Board has Consistently Found Electric System Dispatchers Not to Be Supervisors under the *Oakwood Healthcare* Trilogy

The Board has considered the status of electric system dispatchers in another case post-*Oakwood*, and similarly found them not to be supervisors. *See Avista Corp*, Case 19-RC-15234 (Decision on Review and Order) (NLRB April 11, 2011), *approving* Decision and Direction of Election ("DDE") (Sept. 4, 2009). Because the Board's decision is summary, the underlying determination by the NLRB Regional Director provides the only recitation of the analysis being approved. And that analysis is in keeping with those approved by the courts in the cases discussed in the preceding section.

In *Avista Corp.,* the Director fist ruled that dispatchers did not assign field employees under *Oakwood*, because the field employees were, on a daily basis, assigned to "areas, shifts and tasks" by their own supervisors in a different department, and thus the dispatchers, at best, give the field employees only ad hoc instructions. DDE, slip op. at 8. Even assuming the dispatchers did engage in supervisory assignment however, the Director also found that they did not engage in supervisory independent judgment when they did so, because: (1) they did not form an opinion of the field employee's skills in selecting the employee for the assignment, which entails dispatching first responders, with whom the dispatcher will then make a collaborative decision regarding the need for additional personnel, (2) they otherwise interact with employees based on employer

guidelines, commonsense considerations and the field employees' judgment and consent (for example, when prioritizing incidents and reassigning employees to additional trouble incidents; calling in field employees and other dispatchers); and (3) someone above the dispatchers is monitoring the system or is available to do so. *Id.* at 41.

The Director also found that the dispatchers did not engage in responsible direction, as explained in *Oakwood Healthcare.* First the Director found that the dispatchers did not "direct" field employees under *Oakwood* because they did not actually decide "what job shall be done next or who shall do it." *Id.* at 10. The Director found that, aside from non-emergency work, the order of dispatched work is determined primarily by the order of trouble calls received; that dispatches during normal weekday hours are the result of a collaborative process between dispatchers and crew foremen; and that dispatches after hours and on week-ends are largely dictated by an automated on-call system and/or the parties' collective bargaining agreement. *Id.*

In addition, even assuming the dispatchers do "direct" the work of field employees, the Director found that they do not do so "responsibly" because they are not *accountable* for the field employees' proper performance of their jobs. *Id.* at 10-11. First, the employer did not offer evidence that dispatchers are authorized to take corrective action against field employees, or that field employees have been

informed that they are required to follow the dispatchers' directions. *Id.* at 11. Second, the employer did not prove that dispatchers are *ever* held accountable for their direction of field employees. *Id.* Instead, the employer proved only that dispatchers are held accountable "for *their actions* in connection with the restoration of power in the most efficient and expedient manner possible." *Id.* (emphasis in original)[7] The Director did not go on to evaluate independent judgment once he found no accountability.

The Court of Appeals for the District of Columbia Circuit upheld the Board's determination. *See Avista Corp. v. NLRB,* No. 11-1397, 2013 U.S. App. Lexis 1377 (D.C. Cir. Jan. 18, 2013) (stating that that the Board's decision in *Oakwood* is the "controlling law" and "undisputedly reflects sound law"), *enforcing Avista Corp,* Case 19-RC-15234 (Decision on Review and Order) (NLRB April 11, 2011).

[7] While the Director did go on to also analyze the dispatchers' supervisory status under *Mississippi Power & Light,* that analysis is not relevant here, as the Board and the court of appeals did not rely on it. *See Avista Corp.,* Case 19-RC-15234 (Decision on Review and Order), slip op. at 2 n.2 ("we find it unnecessary to rely on the Regional Director's discussion of *Mississippi Power & Light*), *enforced* sub nom, *Avista Corp. v. NLRB,* 496 F. App'x 92 (D.C. Cir. 2013) (unpublished).

D. EMI's Dispatchers are not Supervisors under the *Oakwood* Trilogy

EMI argues that the facts in this case are the same as in *Entergy Gulf States*, and thus the outcome should be the same. Even if we accept EMI's assertion that the fact are the same, it is indisputable that the *law* has changed, and that the Board has provided reasoned explanations for those changes. Thus, the Court, if it does not disagree with the *Oakwood* standards themselves, must uphold the Board's decision if it is supported by substantial evidence on the record as a whole. *NLRB v. Adco, Inc.*, 6 F.3d 1110, 1115-1116 (5th Cir. 1993).

1. Substantial Evidence Supports the Board's Ruling that the Dispatchers do Not Engage in Responsible Direction of Field Employees

The Board's analysis of the dispatchers' authority "responsibly to direct" field employees focuses on the question whether the dispatchers are "accountable" for any bad performance of the field employees. As stated, there are two components of proof required to establish accountability, and thus responsibility. The employer must establish that the dispatchers are subject to adverse consequences for the errors of the field employees, rather than simply for their own errors. *See, e.g., Frenchtown Acquisition Co. v. NLRB,* 683 F.3d 298, 314 (6th Cir. 2012); *Rochelle Waste Disposal, LLC v. NLRB,* 673 F.3d 587, 596 (7th Cir. 2012); and *Mars Home for Youth v. NLRB,* 666 F.3d 850, 854 n.2 (3d Cir 2011). The employer must *also* establish that the dispatchers are authorized to take corrective

action with regard to the field employees' performance. *See, e.g., Lakeland Healthcare Associates, Inc. v. NLRB,* 696 F.3d 1332, 1344 (11th Cir. 2012); and *Loparex LLC v. NLRB,* 591 F.3d 540, 549-50 (7th Cir. 2009). This is a marked change in the law since this Court interpreted "accountable" in *Entergy Gulf States*: in that case, the Court was unconcerned that the dispatchers at issue were "not responsible…if field workers failed to follow instructions" from their dispatchers. 253 F.3d at 206, 209-211.

1. Accountability

The Board's conclusion that the evidence proffered by the employer in this case demonstrates only the "dispatchers are accountable for their own work, *i.e.,* their own failures and errors, and not for those of the field employees" is supported by the record as a whole.

Although the employer provided a great deal of evidence that dispatchers are frequently held accountable and are counseled (or more) for their *own* errors, there is no persuasive evidence that any dispatcher has suffered any adverse employment consequence because a field employee did not perform properly.

Thus, dispatchers have been disciplined for failing to perform their *own* jobs when they: (1) failed to remove the names of field employees from the computer after the field employees had signed off and gone home (Breckenridge, PE27-2006, 2006TR158-62); (2) failed to call the entire list of service personnel

available for overtime (Robinson, PE32-2006) (3) failed to enter accurate data and thus closed out cases improperly (Carter, PE20-2006, PE21-2006, PE22-2006, PE26-2003; 2006TR148-48,151-52, 157-58; Clifford, PE25-2006, 2006TR156-57; Hooper, PE28-2006, 2006TR163; McCullough, PE 23-2006, 2006TR153; Robinson R., PE48-2006, PE46-2006; Robinson S., PE19-2006; Thompson, PE24-2006, PE30-2006, PE 31-2006; (4) failed to complete training (Robinson, PE47-2006); (5) failed to log switching activity and substation alarms (Robinson, PE47-2006); (6) fell asleep during safety meetings (Robinson, PE47-2006); (7) failed to attend safety meetings (Robinson, PE47-2006); (8) failed to adjust expected restoration time correctly (all dispatchers, PE29-2006, 2006TR164-69); (9) failed to switch off the automatic call back after a customer's service had been restored (Sistrunk and Robinson, PE16-2006, 2006TR131-37); (10) failed to clear outages quickly enough (crew of dispatchers, PE 32-2006); and (11) failed to forward safety instructions (Cannon, PE49-2006); (12) erred in the progress of a switching incident (PE35-2006, PE39-2006, PE40-2006, PE54-2006, PE55-2006).

In none of these incidents, however, were the dispatchers held accountable for the conduct of any *field personnel*. Instead, they were held accountable only for their own conduct. And, in such cases, appellate courts have not found the employees at issue to be supervisors under *Oakwood Healthcare*. *See, e.g., Mars Home for Youth v. NLRB*, 666 F.3d 850, 854 (3d Cir. 2011) (finding that assistant

managers were not "responsible" for aides performance because record showed only that assistant managers were responsible for their own failings as managers). Moreover, where there is an absence of evidence, as here, that the purported supervisor is not held accountable when a lower level employee performs inadequately, "it highly supports a finding that the purported supervisor is not actually at risk of suffering adverse consequences." *Id.*

Indeed, the only appellate decision to disagree with the Board on the question of sufficient proof of "adverse consequences" (in *Lakeland Healthcare,* 696 F.3d at 1135-1346*),* is distinguishable from the instant situation. There the court found that statements on the purported supervisors' job descriptions to the effect that the primary purpose of LPNs was to "supervise the day-to-day nursing activities performed by nursing assistants," coupled with testimony that the LPN's "would be written up if they failed to do so" and a lack of any contradictory testimony, was sufficient evidence that they were "accountable" as supervisors. In the instant case, in contrast, the only extant job descriptions for the dispatchers do not contain any language making them responsible for the field employees (*see* UE3-2003 and UE4-2003), and the conclusory testimony by the employers' witnesses, that they are responsible is, as stated above, contradicted by the employer's own exhibits and testimony.

Despite overwhelming evidence to the contrary, EMI insists that the dispatchers are accountable, based on two examples. In the first example, a dispatcher allegedly suffered adverse consequences for an error a field employee had made during a switching incident (PB 31) The Board was correct, however, to disregard the employer's assertion. First, the dispatcher was not held accountable in any way in the switching report (PE 56-2006). Second, the employer's witness testified that he coached and counseled the dispatcher for the incident because of the *dispatcher's* failure to act on his sense of the field employee's "uneasiness" (2006TR329-30). Finally, the witness acknowledged that he had not placed any documentation of the counseling session in the dispatcher's file, even though that step is required by the employer's own disciplinary policy. (2006TR331; PE17-2006 at 6.1.1.2) Thus it appears that the dispatcher was coached for his own error, not that of the field employee. Moreover, even if the dispatcher had been counseled for the field employee's error, that does not amount to evidence of "adverse consequences" or "accountability" when the dispatcher's supervisor failed to include any reference to the coaching in the dispatcher's file. *See Rochelle Waste Disposal,* 637 F.3d at 596 (no "accountability" established where alleged supervisor was given "oral reprimand" but there was no evidence that he suffered any adverse consequences as a result of the reprimand).

EMI's second example is similarly unpersuasive, *i.e.*, that dispatchers were counseled after switching errors, even though it was field employees who failed to observe and stop the errors. (PB31) (PE54-2006; 2006TR319-20; PE55-2006; 2006TR320-22) The employer's assertion that it was holding the *dispatchers* accountable for the *field employee's* error does not make sense in either of these cases. The employer acknowledged that the field employee was not even disciplined in either instance, thus signaling the small role the field personnel played in the error. Moreover, it would be somewhat incongruous to say that the dispatchers are supervisors when being disciplined for the field employee's failure to cure the *dispatcher's* error.

Finally, the fact that the dispatchers are not structurally in the same chain of command as the field employees (as set forth above at 2-4) offers further support for the Board's conclusion that they are not accountable for the actions EMI's field employees.

(b) Independent Judgment

Because the Board correctly found that the dispatchers are not accountable, and thus do not have the do not have the authority "responsibly to direct" the field employees, it is irrelevant whether any direction they do give is the result of any "independent judgment." Accordingly, federal appellate courts that have found a lack of accountability have similarly refrained from the fruitless exercise of

evaluating when this lack of accountability was accompanied by independent judgment. *See* above, Section I.B.2.b.(2)(c)(2), and cases cited therein. Thus, the employer's arguments on this issue (at PB 44-48) are superfluous.

2. Substantial Evidence Supports the Board's Ruling that EMI's Dispatchers do Not Assign Work to Field Employees Using Independent Judgment

The record as a whole contains substantial evidence that supports the Board's decision that dispatchers do not engage in supervisory assignment of field employees.

As stated, there are three possible areas of 2(11) assignment: time, place and significant overall duties, when made with the use of independent judgment. EMI insists that the dispatchers assign field employees under all three scenarios, and then use independent judgment in making these "assignments." (PB at 39-43) EMI's arguments, however, are contradicted by the evidence of record.

a. Significant Overall Duties

The Board decided that the dispatchers do not in fact assign significant overall duties, but assign only "tasks" such as specific trouble orders.[8] Thus, the Board had no need, contrary to EMI's assertion, to engage in any analysis of whether the dispatchers use independent judgment when assigning these "tasks." (PB41-43)

[8] The assignment of tasks is not 2(11) assignment, but direction. *Oakwood Healthcare*, 348 NLRB at 692**.**

And the Board's conclusion that the dispatchers do not assign significant overall duties to the field employees is supported by substantial evidence. As stated, it is the Operations Coordinator, and not the dispatcher, who makes the daily work assignments for the field employees. (03TR162,164) In addition, at least one field employee is pre-designated by the Operations Coordinator to catch the trouble calls for the day. (03TR1209; UE14-2003; UE15a-15e-2003) Thus, when the dispatcher contacts the field employee for a trouble call, he is merely giving an ad hoc instruction for the field employee to do something he has already been assigned to do if the situation arises. And, contrary to EMI's assertion, the dispatcher does not tell the field employee "what specific tasks the employee needs to perform to resolve the situation."

Like the LPN's in *Lakeland Healthcare Association,* 696 F.3d at 1347, any "tasks" the dispatchers in the instant case may assign are "situational, depending on particular needs as they arise," and are not therefore, "significant overall duties." *See also Mars Home for Youth v. NLRB,* 666 F.3d at 855 (where purported supervisors give assignments that are only ad hoc in nature, like telling an assistant to monitor a particular patient or responding to a crises, they are not assigning significant overall duties).

b. Place

The Board found that, even assuming that the dispatchers' temporary assignment of field employees to a trouble location is 2(11) "assignment," it does not meet the definition of supervisory assignment because the dispatchers do not use independent judgment when assigning field employees to these locations. Rather, it is the *location* of the outage that dictates to where the field employees will be temporarily re-routed, and the dispatchers usually assign by geographic location of the troubleman, and by and common sense. *Entergy Mississippi,* 357 NLRB No. 178, slip op. at 7. (DOR 1925) The dispatchers, contrary to the employer's contention, do not chose the troubleman on the basis of evaluating his skills, and does not even chose the "type of employee to send." (PB41)

One major problem with EMI's analysis is that the employer attempts to extend the complexity of the dispatchers' own overall jobs to the dispatchers' interactions with field employees. (PB 49 "[t]he Dispatchers at EMI operate in a dynamic environment with numerous unplanned contingencies in several different areas…"). But, independent judgment is only supervisory when it is utilized in connection with one of the 12 supervisory functions. Thus, no matter how complicated the dispatchers own jobs may be, and how much independent judgment they may exercise in other areas, one has to examine the judgment used when re-assigning a field employee to determine if that assignment is supervisory.

Oakwood Healthcare, 348 NLRB at 692; *Northeast Utilities Service Corp. v. NLRB,* 35 F.3d 621, 625 (1st Cir. 1994); *Brown and Sharpe Manufacturing Co.,* 169 F.2d 331, 335-36 (1st Cir. 1948).

And, as other federal appellate courts have held, where employees are pre-assigned to specific duties by someone other than the purported supervisor, and the alleged supervisor reassignments are based on mechanical and geographical considerations and the assignments are not made by assessing the skills of the employees, the assignment is not a product of independent judgment. *See NLRB v. Atlantic Paratransit,* 300 Fed. Appx. at 56-57 (factors driver dispatchers rely on to re-assign drivers are largely mechanical and geographical and do not rest on considerations of the skills of the drivers).

There is no record evidence to support any assertion that the dispatchers assign field employees to trouble situation based on any assessment of the individual employees' skills. Instead, they assign by geographic location and in accordance with management pre-designations. On the distribution side, the Network management assigns field employees to their shifts and their duties; the dispatchers dispatch "trouble" (unplanned outage) calls to the field employees based on where their supervisors have already placed them for the day's work, or based on seniority. (03TR1212-16,1389,1485-86)

Each Network provides the dispatchers with a "day-to-day line up" of

which employees are working in which areas, what time the late person is coming in, and who that will be. (03TR1209) The Network designates in advance which persons will act as troubleman on any given day. (UE14-2003; *see also* UE15a through 15e-2003) The dispatchers follow these lists (03TR1211), which indicate the way the Network Manager wants the trouble calls done. (03TR1223,1225) If the dispatcher has any doubt about the line-up, he calls the Operations Coordinator in the Network Office. (03TR1215) If there is more trouble than the field employee/trouble designee can handle, the dispatcher touches base with the Network and asks if he can use some more of their people. (03TR1389) If there is no trouble, the designated troubleman does not have any contact with the dispatchers during the day. (03TR1412)

Once the dispatcher calls out a troubleman, the two work together until all of the trouble is cleared up or until the end of the troubleman's shift. (03TR1389-90) The dispatcher can shift troublemen from one location to another, but, if there is any conflict with other assignments, *the dispatcher contacts the Network Manager*. (03TR1110-11) If the work is not completed by the end of the troubleman's regular shift, the dispatcher can ask the troubleman to stay, but cannot require him to do so. (03TR1390,1495) Generally though, everyone works until they "get the lights back on." (03TR1390)

A field employee who arrives at the scene of the trouble can call the

dispatchers and report that he needs help, and the dispatchers will respond. (03TR465,784,1122) As employer witness Allen East explained, the dispatcher calls the designated "first responder" (03TR751), *i.e.*, the troubleman. If the first responder/troubleman feels he or she needs a crew, the dispatcher will call the crew out. (03TR751) The field employee will even specify which classification(s) of workers he needs. (03TR1153) In fact, the collective bargaining agreement *requires* the dispatcher to provide assistance requested by a serviceman or troubleman. (03TR872; PE7-2003at¶62)

On the transmission side, the daily assignments of transmission field employees are set by their field supervisors, the Substation Maintenance Supervisors, North and South (03TR368), or by the computerized maintenance management program. (03TR369) The employer's witness testified that during regular working hours, the dispatchers call the field employee who has been assigned to the particular area where the trouble occurred (03TR299), but a system dispatcher, Rex Cannon, testified that he calls the area supervisor who, in turn, calls someone to the trouble spot. (03TR1474)

In addition, dispatchers prioritize incidents in accordance with the employer's understood guidelines and general common sense. Thus, as distribution dispatcher Tony DeLaughter explained, prioritization is a simple matter of starting with the largest outages first and working down the list or, if

more than one circuit is out, working on the one where they already have people. (03TR1175-76,1386-87,1391) The dispatchers are taught to pay attention to major customers and hospitals. (03TR1388,1406) This comports, DeLaughter noted, with both his training by the company and with common sense. (*Id.*) The dispatchers follow this procedure unless overruled by management, which may place a certain area of town at a higher priority. (03TR1176)

Moreover, the dispatchers organize trouble calls with the assistance of the employer's Automated Mapping and Facilities Mapping ("AM/FM") computer system, which tells the dispatcher exactly which devices have gone out, pinpoints their locations, and identifies the location, nature and number of affected customers. (03TR63-64,568,847) The AM/FM system groups trouble tickets automatically, replacing – and greatly simplifying – the old system, where the dispatchers had to physically keep track of and sort stacks of paper tickets and try to prioritize the work on their own. (03TR669,735,921,1161) As Manager East acknowledged, the raw information formerly contained in a "snowfall of white tickets" is now up on the screen and pre-organized for the dispatcher. (03TR846-47)

On the transmission side, the transmission/system dispatchers prioritize restoration of service in accordance with the employer's "Major Accounts" department: if multiple lines trip out, the first response is to go to the major

accounts. (03TR333) Each of the system dispatchers also calls his manager, Sistrunk, about once a day so that he can notify the Major Accounts group about any equipment off line, so that they, in turn, can advise the customer. (03TR414) Keeping the Major Accounts customers informed is important because it affects sales. (03TR415)

Consequently, there is substantial record evidence that the dispatchers do not use independent judgment when sending field employees to a "place" to address trouble calls.

c. Time

It is undisputed that the dispatchers do not assign field employees to their shifts, and the Board correctly found that dispatchers do not engage in supervisory assignment of overtime.

The Board incorporated, in the *Oakwood Healthcare* cases, the long-held concept that, to establish that the authority to assign overtime is supervisory, the evidence must establish that the purported supervisor can *require* the supervised employee to work the assigned overtime. *See, e.g.*, *Golden Crest Healthcare,* 348 NLRB 727, 729 (2006). *See also Mars Home for Youth v. NLRB,* 666 F.3d 850, 855 (3d Cir. 2011).

As the Board found, the employer failed to establish that the dispatchers can require the field employees to accept overtime, that is, the employer's conclusory

statements and other strained testimony are contradicted by straightforward statements that, if an employee refuses overtime, the dispatcher can "do nothing."

First, field employees are assigned to *planned* overtime by their own direct supervisors, not by the dispatchers. (03TR1212-16,1389,1485-86 (distribution); 03TR368-369 (transmission). Second, there is record testimony from a dispatcher, a field employee, and the local union's then-Business Manager, that a field employee is not obligated to accept overtime. (03TR1390,1113,1454) When a field employee declines, the dispatcher has to find someone else. (03TR1113) Although everyone generally works until they "get the lights back on," the dispatchers do not have the authority to require the troublemen to continue to work. (03TR1390,1495) *See also* PE28-2003 (field supervisor had to be consulted when dispatcher asked for overtime and field employee advised him there were management constraints on overtime).

Second, when an outage occurs *after hours* on the distribution side,[9] the dispatchers call field employees, following the collective bargaining agreement and the protocol established by the Network Manager for the particular territory. (03TR1227-28,1229,1231,1235,1236-40) As EMI acknowledged in its Request for Review by the Board, that dispatchers cannot *require* field employees to accept an after-hours call-out. *See* PRB26 ("no individual at EMI, including the CEO,

[9] Transmission dispatchers do not call the field employees, but instead contact the on-call supervisors. (03TR298,351,1474)

can force a Field Employee to respond to an after-hours call out under the terms of the Field Employees' collective bargaining agreement." *See also* 03TR141,772.

Thus, the employer has failed to establish that dispatchers either responsibly direct or assign work to the field employees in accordance with the Board's *Oakwood Healthcare* standards, as approved and enforced by the federal appellate courts.

E. EMI's Laches Argument Lacks Merit

Intervenor hereby adopts the arguments made by the General Counsel that EMI's laches defense is unavailing (BB46-48), and will address only one point: EMI's claim that it is prejudiced because "the Unions can unjustly claim additional liability and damages." (PB55)

The question of damages is totally speculative and there is nothing in the record to suggest that EMI will incur *any* monetary liability in this case. The record sheds no light on whether EMI raised the dispatchers' salaries or increased their benefits when it removed them from the unit, or what the dispatchers' compensation and benefits would have been today if EMI had not removed them from the unit. Indeed, having made its dispatchers part of management, EMI may have compensated them and given them benefits accordingly and thus may incur nothing in "making them whole" if the Court enforces the Board's Order.

CONCLUSION

For the foregoing reasons, intervenor respectfully requests that the Court deny EMI's petition for review and enforce the Board's Order in full.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ENTERGY MISSSSIIPPI, INC.	*	
	*	
Petitioner/Cross-Respondent	*	No. 12-60796
	*	
v.	*	
	*	
	*	Board Case No.
NATIONAL LABOR RELATIONS BOARD	*	15-CA-17213
	*	
Respondent/Cross-Petitioner	*	

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of Intervenor's Brief in Support of the National Labor Relations Board, on the following counsel of record, by electronic mail, on April 29, 2015:

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Intervenor certifies that its brief contains 10,655 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2010.

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Dated at Washington, D.C.
This 29th day of April, 2015